



**Kang’Oroti v Gikungi & another (Civil Application 59 of 2019)
[2021] KECA 236 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 236 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 59 OF 2019
RN NAMBUYE, PO KIAGE & AK MURGOR, JJA
DECEMBER 3, 2021**

BETWEEN

BERNARD MBUTI KANG’OROTI APPLICANT

AND

NJAGI GIKUNGI 1ST RESPONDENT

LUCY WANJIKU MAGONDU 2ND RESPONDENT

*(Being an application for injunction pending the hearing and determination
of appeal against the judgment and decree of the Environment and Land
Court (Y. M. Angima J.) dated 13th March 2019 in Embu ELC No. 24 of 2014)*

RULING

1. By a Notice of Motion dated 18th April 2019, the applicant Bernard Mbuti Kang’oroti has sought an injunction to restrain the 2nd respondent, Lucy Wanjiku Magondu her agents servants or any person claiming interest under her from entering, removing, destroying trees, subdividing, charging or transferring land parcels no. Mbeti/Gachuriri/1833 and 1834 (the subdivided portions) pending the hearing and determination of the appeal.

The application was brought on the grounds that the applicant’s claim for adverse possession of land parcel No. Mbeti/Gachuriri/30, which the 1st respondent, Njagi Gikungi had subdivided into 5 portions, was partly dismissed as he was awarded 3 of the 5 portions, namely, land parcels No. 1831, 1832 and 1835, while, the subdivided portions were transferred to the 2nd respondent. The applicant was dissatisfied with the judgment and intends to appeal against that decision. He further claimed that following the trial court’s decision, the 2nd respondent has attempted to enter onto the subdivided portions and to have him evicted.



2. In a supporting affidavit sworn on 18th April 2019, and in written submissions, the applicant averred, inter alia, that he entered on to land parcel No. Mbeti/Gachuriri/30, as a purchaser in 1980, and in the course of his occupation, the 1st respondent subdivided the land into 5 portions and transferred the subdivided portions to the 2nd respondent. The applicant contended that the 2nd respondent has never been in occupation of the subdivided portions but, nevertheless seeks to have him evicted.
3. In a replying affidavit sworn on 2nd August 2019 and in written submissions, the 2nd respondent asserted that she has remained in occupation of the subdivided portions of which the applicant is not in possession; that the appeal is not arguable and has no chances of success, and further that the question of the appeal being rendered nugatory did not arise, since she was in occupation and that therefore the order seeking to restrain her from evicting him was unnecessary and unwarranted in the circumstances of this application.
4. The 1st respondent filed written submissions, which largely supported the 2nd respondent's case.
5. The Notice of Motion dated 18th April 2019 came before us for hearing on 5th October, 2020. It was canvassed through the respective parties rival pleadings, applicant's submissions and legal authorities without oral highlighting. Upon due consideration, we made orders as follows:
 - “ 1. An interim order of status quo as at 13th March 2019 be maintained pending delivery of the ruling on 20th November 2020.”
6. In so far as applications filed under rule 5 (2) (b) of this Court's rules are concerned, the threshold requirements to be satisfied are as exemplified in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others [2009]eKLR*, among numerous others are that;
 - “ The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”
7. In satisfaction of the first prerequisite, it is the applicant's case that he intends to argue on appeal, inter alia, that the learned judge having found that the 1st respondent's title was extinguished by the applicant having been in possession from 1980, wrongly held that the 1st respondent remained the registered owner of the subdivided portions, which he then transferred to the 2nd respondent; that the judge erred in finding that the applicant had not acquired the subdivided portions for the reasons that he was not in occupation of the entire parcel No. Mbeti/Gacuriri/30, when in fact he was in occupation of and was utilizing the entire parcel. In effect, what the applicant is infact asserting, is that the trial court failed to properly evaluate the evidence, and in so doing, arrived at the wrong decision.
8. The position we take on the above rival position and which in our view is the correct position in law is that an arguable appeal need not be one that must succeed but one that warrants the court's interrogation and a response from the opposite party. See the case of *Joseph Gitabi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008*. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite.

See the case of *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*.



9. We find the grounds intended to be raised on appeal highlighted above arguable notwithstanding their ultimate success or otherwise. We are therefore satisfied that the applicant has satisfied the first prerequisite and or ingredient under the above rule.
10. As to whether the appeal would be rendered nugatory, the applicant claims to be in possession, of the subdivided portions and that the 2nd respondent is intent on evicting him from the portions he occupies. On the other hand, the 2nd respondent averred that she was in occupation of the subdivided portions, and therefore the claims that she is intent on evicting him are unwarranted, to the extent that the application is unfounded.
11. What it would appear from the above is that, the applicant and the 2nd respondent both claim to be in occupation of the subdivided portions. But this notwithstanding, there is nothing in the pleadings that is demonstrative of an intent by the 2nd respondent to evict the applicant, so as to render the appeal nugatory.
12. Given the situation on the ground as highlighted above, it is our position that granting an order of injunction in the circumstances prevailing in the application under consideration as sought for by the applicant would not meet ends of justice to both parties herein. In our view, the order that would best lend itself to this case is one for maintenance of the status quo, pending the hearing and determination of the appeal. By status quo we mean that:
 1. The status quo prevailing on the subdivided portions as at 13th March, 2019 as was ordered in the interim order of 5th October, 2020 shall be maintained between the applicant and the 2nd respondent pending hearing and determination of the appeal
 2. The intended appeal if not filed as yet to be filed within ninety (90) days of the date of the delivery of this ruling and thereafter to be processed for expeditious disposal.
 3. In default of compliance with item 2 above, the status quo order granted under item 1 above to stand lapsed.
 4. Costs in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL



I certify that this is a true copy of the original

DEPUTY REGISTRAR

